BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In The Matter Of) WC Docket No. 05-337

High-Cost Universal Service Support) CC Docket No. 96-45

Federal-State Joint Board on Universal Service)

COMMENTS OF THE UTAH DIVISION OF PUBLIC UTILITIES

May 19, 2008

**COMMENTS ON "EQUAL SUPPORT RULE"
FCC 08-4**

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Before the
Federal Communications Commission
Washington, D.C.

EXECUTIVE SUMMARY

The Utah Division of Public Utilities (UDPU), Investigative Staff for the Utah Public Service Commission submits comments in regards to the Commission's rules governing the amount of high-cost universal service support provided to competitive eligible telecommunications carriers (CETC). Federal Communications Commission (FCC) Public Notice released on January 29, 2008, WC Docket No. 05-337 and CC Docket No. 96-45.

The UDPU supports the Commission's tentative proposal to realign the Universal Service Support Fund due to problems that have been brought to the forefront by the ever-changing evolution of the telecommunication industry and its need for support to provide service to high cost areas. Modification to the current qualifying criteria of the Universal Service Support Fund is essential to aid in the preservation of the Universal Service Fund and to sustain the theory of Congress,[1] the assurance that rate payers have choice through the introduction of competition.

The UDPU provides comments on three key issues. Those being 1) Identical Support or Equal Support rule, 2) the Commission's tentative conclusion to provide support to a Competitive Eligible Telecommunication Carrier (CETC) based on its own cost of providing supported service, and 3) viable methodologies to calculate the high cost USF support for competitive providers.

The UDPU believes that it is imperative that the FCC weigh the issues in its NPRM carefully, and formulate accurate conclusions. How the FCC rules on these issues will have a direct impact on the Utah Universal Service Fund, which is designed to reflect federal USF mandates[2]. Flawed conclusions could potentially result in "harm" to rate payers, both state and federal, through additional draws on state USF programs by rural independent telecommunication companies, and significant surcharge

[1] 1996 Telecommunication Act

[2] Utah Code Title 54 Public Utilities Statutes 54-8b-15and Utah Public Service Commission Rules R746-360

increases on consumer bills. Increase in the surcharge to support competition, is in its self a misconception to the intent of the 1996 Telecommunication Act.

II DISCUSSION

ISSUE # 1- "IDENTICAL SUPPORT" AND/OR "EQUAL SUPPORT RULE"

The UDPU fully supports the FCC's tentative conclusion to eliminate its "Identical Support" rule. The rule, as written, is not in the public interest, nor does it provide competitive neutrality as designed by Congress in the 1996 Telecommunication Act. The rule allows the same recovery for a CETC that serves a relatively small area, incurring less cost and obtaining more revenue (cherry picking) than an incumbent Local Exchange Carrier (ILEC) who is obligated to be the carrier of last resort.

Although motivated by competitive neutrality, the rule is not neutral. The "Identical Support" rule does not encourage competitive neutrality even though both carriers are receiving the same line support. For instance, it is typical for an ILEC and a wireless provider to serve the same subscriber. When the wireless carrier is a CETC, both carriers are receiving identical USF contributions for the same subscriber which has the compounding effect of escalating both the Federal and possibly State USF programs. The ILEC is competitively disadvantaged since it builds a network that serves both high cost and low cost subscribers, while a CETC does not have to adhere to the same requirement and therefore can build a relatively small network to serve only low cost, high revenue subscribers and yet collect the same USF subsidy as the ILEC. The USF was not designed to subsidize competition. The USF is to be used to provide basic residential service to high cost areas.

To date the "Identical Support" rule has not impacted the Utah USF. The Utah Public Service Commission found that CETC providers may be encouraged to enter a rural market that could not economically support a second or third carrier. In prior Dockets the Utah Public Service Commission and the Utah Supreme Court have arrived at supporting conclusions.[3] In

[3] Utah Supreme Court Order WWC Holding Co. INC vs. Public Service Commission 44 P 3d 714 pg 5 (12) (March 5, 2005)

Western Wireless's application to be an ETC in rural Utah, the Public Service Commission found that having more than one ETC serving in an area may not provide public benefit, and therefore was not in the public interest. This finding was supported by a Utah Supreme Court Order.[4] The Supreme Court found,

> Thus, the PSC's Order is not against competition per se, but, rather, merely recognizes that in *some instances* competition in *rural areas* by multiple ETCs receiving state universal service support may not be in the public interest. The record contains expert testimony stating that there was a strong probability that designating a second ETC in many areas would reduce revenues to all ETCs. This, in turn, could result in either (1) an increase in the total costs of providing universal service support, or (2) a reduction in funding to ETCs, resulting in rate increases, decreases in infrastructure investment and/or service. The likely effect of either scenario would be to increase financial demands on the State Fund.

That being said, two years later, after an in depth investigation, the Utah Public Service Commission in a recent Order[5]did decide that it was in the public interest for more than one provider to compete in a predetermined rural ILEC serving area. In spite of this the Utah Public Service Commission did remain consistent with its prior Western Wireless Order.[6] If a new provider is not an ETC it could not collect state USF pursuant to its rules and regulations.[7]

Moreover, there are other subsequent problems associated with the federal rule. A recent Docket in Utah[8] indirectly revealed that some wireless CETC's may be utilizing the federal and state USF monies to support their effort to grow or construct an overlay network to serve new customers who, in some cases, may not even be located in the USF serving area for which it is applying.

It is the UDPU's grave concern that as competition grows a competing carrier may come to the Utah Public Service Commission to apply for ETC status. If that carrier meets the qualifying requirements, the Utah Public Service Commission would be obligated, pursuant to the federal rule, to allow distribution of similar State USF monies to both carriers for the same

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[4] Utah Supreme Court Order WWC Holding Co. INC vs. Public Service Commission 44 P 3d 714 (March 5, 2005)

[5] Bresen Application to be a CPCN Docket 07-2476-01

[6] Utah Supreme Court Order WWC Holding Co. INC vs. Public Service Commission 44 P 3d 714 (March 5, 2005)

[7] Utah Public Service Commission Rule R746-360-6 (A)(1)

[8] Utah Docket 04-049-145 Qwest Corporation Arbitration of Union Cellular Under Section 252 of the Federal Act.

subscriber. The Utah USF program would then experience the same problems of unsustainability that the Federal USF fund is experiencing.

As it is written now, the UDPU considers the Federal "Identical Support" rule to be detrimental to the general public of this nation. In all due respect, for the Commission to allow the continuance of escalating Federal USF tax on consumers throughout this nation which Federal USF tax's sole purpose appears to be a subsidy for multiple telecommunication providers serving the same subscriber, is disingenuous. The Rule blatantly violates Congress's intent and the Federal-State Joint Board's recommendation, to create an economic and competitively neural telecommunications environment[9] Furthermore, the rule may possibly encourage fraudulent behavior by telecommunication providers.

The UDPU continues to believe that competition must be allowed to thrive as mandated by Congress in the 1996 Telecommunication Act. It may be advantageous for an ILEC and CETC to serve in the same areas so long as State Commissions have the opportunity to conduct and an in depth review of each individual ETC application to determine if it is in the public interest.

Furthermore, to resolve the current problems with the Federal USF and to aid the state in its effort, the UDPU recommends that the Federal USF Rule be amended to allow payment of USF monies to one individual telecommunication provider in the ILEC's study area when two or more providers are present. The UDPU recommends that that the allocation be based on a subscriber's principal address (one subscriber per address). The reasoning behind this suggestion is that in the case of cellular service, an individual address could potentially have numerous cell phones. Designating one subscriber per address for which USF is distributed will eliminate multiple dispersals for the same address. As a CETC acquires a subscriber of an ILEC, the USF subsidy would <u>transfer</u> to the new provider. Likewise, the ILEC will loose USF contribution for the individual subscriber.

Although the UDPU supports modification to the Federal rule, it is important to point out that the change will be somewhat detrimental for states such as Utah. The Utah Public Service Commission and the Utah Legislature will be forced to amend the State USF rules and statutes to prevent the impact of unsustainability of its USF program as the rural companies strive to be made "whole."

Another critical point to consider in its decision is that a new CETC must be committed to offer basic feature and service functionality similar to that which the ILEC has provided its subscribers, as is currently outlined in

[9] Id. At 8801, para.47

the Federal and State ETC rules. The FCC must be diligent in adhering to the policy, prior to granting a new provided USF subsidy otherwise the subscriber will be disadvantaged.

In Summary of Issue #1, Eliminate the "Identical Support Rule." An amended Federal USF policy, as discussed above, will aid in maintaining a manageable and predictable level of USF subsidy contributions both for the Federal and State USF programs.

ISSUE #2 BASIS OF SUPPORT FOR A COMPETITIVE ETC (CETC)

The UDPU fully agrees with the FCC's tentative conclusion that a CETC must file cost data with the State and Federal Commissions that is comparable to the practice for rural ETCs USF distribution. To create a competitively neutral playing field, it is imperative that prior to USF distribution, CETCs reveal their own costs on a per line basis given that the network technology may differ significantly from that of the incumbent rural ETC.

Unlike the rural ETC, CETCs inherently construct efficient, cost effective networks to serve precise telecommunication markets, because they are not required to develop overlay networks to serve all subscribers. As discussed in Issue #1, the CTEC's market share may be diminutive requiring lesser capital investment, but reaping high revenues. To allocate a USF subsidy to a CETC provider that is comparable to the incumbent ETC could either over or under compensate a CETC for its investments. The problem significantly multiplies when there is more than one CETC serving in the same area, since all providers will most certainly have different market shares.

To be competitively neutral, it is strategically critical for all providers of telecommunication services to adhere to the same rules and regulations. USF support calculated incorrectly would be detrimental to the market. Misallocation of USF distributions could potentially drive other competitors, including the rural ETC, from the market or cause a higher number of providers to enter a market than normal competition would allow because of USF support that is allowing unrealistic profit margins which attracts other companies to provide service within that service area.

A straightforward solution to, alleviate the problem, is to require the CETCs to submit cost studies that demonstrate the expenditures for construction and operation of their network.

Utah's statutes and rules call for the Utah rural ETCs to submit network construction and operation costs in the format of a rate base audit procedure so that the Utah Public Service Commission can determine the level of State USF subsidy it will receive.[10] This procedure is a tool to assure that the Commission, with incumbent ETC input, can determine the appropriate State USF subsidy to be distributed.

The UDPU is not advocating a rate case procedure for the CETC nevertheless it is critical for the CETCs to submit cost-based financial records or studies for review when applying for State and Federal USF subsidy. This procedure will allow the Federal and State Commissions to review the record and award the appropriate level of USF subsidy based on a telecommunications provider's own cost, circumventing over or under distribution of USF monies.

Moreover, UDPU strongly suggests that the rule be amended to <u>mandate</u> that state commissions review cost data and five year plans of ETC applicants prior to submission to USAC for federal USF distribution. The state commissions are familiar with the telecommunication markets and companies operating in their state and currently review ETC applications. Furthermore, stricter compliance with the current Federal ETC rules will go further to assure that USF monies are being used for the purpose in which it was intended to "provide access to affordable basic telephone service."[11]

In summary of Issue 2, the UDPU fully supports the FCC's proposal to require both rural incumbent ETCs and CETCs to file cost-based data and five year plans. We further encourage the FCC to amend its rule to mandate that the state commissions review the cost-based data and five year plans prior to filing with USAC on an annual basis. This procedure ensures accountability that the telecommunication providers are offering the services for which the USF is intended to support. The changes to the FCC's rule, as discussed above, will aid in the assurance that the USF subsidy will be apportioned accurately, provide fund stability, and avert misuse of the fund.

ISSUE #3 METHODOLOGIES TO CALCULATE HIGH COST USF SUPPORT FOR CETC'S

To maintain competitive neutrality, the UDPU believes that the Commission is obligated to compel all providers in the telecommunication industry to adhere to the same rules and regulations. When applying for state and federal USF subsidy, it is critical for all CETC's, to report detailed

[10] Utah Code Title 54 Public Utilities Statue 54-8b-15, Public Service Commission Rules 746-360-8

[11] Utah Code Title 54 Public Utilities Statutes 54-8b-15 (6)

cost data to State Commission's for review and approval. State Commission's are well versed on the characteristics of local geographic areas which permit a more thorough investigative process.

The UDPU strongly endorses the idea that the wireless and wireline CETCs, report cost data in the same manner as the rural ILEC's to assure neutrality. Cost data must be reported using the same account codes and separation systems that are employed by the ILECs. Any other accounting methodology would not permit a valid comparison to the ILEC benchmark, as discussed in the NPRM.[12] However, it must be pointed out that it may not be feasible to expect an exact comparison of cost data, since CETC's network technologies and methodologies vary significantly. Comparisons conducted could only be utilized as a "reasonableness" test.

To further explain, differing CETC network technologies warrant the development of cost methodologies that consider the unique network strategies of both wireline and wireless carriers. Currently the development of USF benchmarks for rural wireline CETCs will be relatively easy since the current (TELRIC) forward-looking economic cost models can be adapted to a competitive wirline provider. The existing cost models can be modified through changes to input values and line counts.

Wireline CETC network components mirror the incumbents local loop, switching and transport. Both the non-rural and rural TELRIC cost models can be adapted to the rural CETC networks by changing input values for the various components and expense modules. One could utilize the CETC's own embedded cost data to populate the cost model for a near comparison to rate of return companies.

The UDPU promotes the idea of creating a generic rural CETC wireline TELRIC cost model which will accommodate all providers serving in a variety of geographic study areas. The advantage is that the cost model can identify estimated costs for all network components, yet will allow the user to change input values if there are significant cost differences for any of the components or assumptions.

Utah has successfully conducted unique cost studies, tailored to specific rural companies using the HAI 5.2 cost model to determine interconnection rates. This process was successful due, impart, to the cooperation of the rural providers and the interconnecting wireless carriers who provided detailed element costs. It is important to note, that there are some difficulties to this process since most competitive providers do not serve the whole study areas or for that matter may only serve a small geographic area within the study

[12] NPRM CC Docket Bi, 96-45 , Section B: Determination of Costs for Competitive ETCs

area. Moreover, experience has shown that use of a generic cost model requires significant network adjustments to input values and line count adjustments.

Subsequently, with the ever increasing demand for USF subsidy by wireless CETCs, it is becoming essential for the FCC to consider the development of a wireless TELRIC cost model for the primary purpose of setting benchmark USF contribution levels as it has done in the past for rural ILECs. As discussed above, the USF subsidy should never mirror the USF subsidy received by the rural ILEC since the telecommunications technologies are vastly different. In the event that the CETC's cost study produces a higher benchmark than the ILEC, all input values being correct, it should receive the higher USF subsidy.

UDPU recently had the opportunity to review a wireless cost model[13] that was filed with the Public Service Commission in a request for Asymmetric interconnection rates for a wireless provider. Although the model did reflect embedded costs it did not contain cost data that was granular in detail to allow a determination of actual or hypothetical costs of elements in a wireless network. Moreover, the UDPU found it very difficult, if not almost impossible, to analyze the cost model due to the model developer's interpretation of the TELRIC principals. The development of a generic wireless cost model would define and clarify these issues.

In summary of Issue #3, if the FCC USF and ETC rules remain unchanged the UDPU, as well as other state commissions, will continue to struggle with wireline/wireless interconnection rates and issues. Moreover, the FCC will continue to experience a universal service fund that is ever increasing. Without the creation of detailed cost studies, USF subsidies will continue to be estimates that add to the current unsustainability of the USF program.

The UDPU agrees with the FCC's tentative conclusion that CETCs must file cost data demonstrating their costs of providing service in a high cost area. A clear and straight-forward solution is the creation of a generic CETC wireless and wireline TELRIC cost model that will assist in the determination of actual cost-based USF Benchmarks and interconnection rates as mandated by Congress in the 1996 Telecommunication Act. Moreover, the UDPU supports the idea that each CETC file cost studies to the relevant state commissions for approval prior to filing with USAC.

III SUMMARY

[13] Docket 04-049-145 Qwest vs. Union Asymmetric Interconnection

First and foremost, the "Identical Support Rule" should be abolished as it is detrimental to the general public of this nation. It is unjustifiable to provide USF subsidy to a second or third competing telecommunications provider in the same designated rural area, all competing to serve the same consumers. The Universal Service goals are defined as;[14]

> The goals of Universal Service, as mandated by the 1996 Act, are to promote the availability of quality services at just, reasonable, and affordable rates;

The definition also states that;

> there should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service;

The "Identical Support Rule" blatantly violates the intent of the Universal Service program. The Commission's accountability is to preserve the sustainability of the Universal Service Fund for the long term to ensure that consumers have access to telecommunication services. If the rule remains in effect, the fund is not sustainable as has been demonstrated over the past years.

The Utah Division of Public Services offers the following recommendations, as an aid to preserve federal and state Universal Service Funds, while striving to advance and maintain competitive neutrality.

- Strictly adhere to this Commission's ETC Rules. Grant broadened jurisdiction to state commissions to assure that an in depth review is conducted and that the petitioned for study area can support more than one telecommunication provider.

- Amend the Federal USF Rule to permit USF subsidy allocation to one individual telecommunication provider in the rural high-cost study area. The subsidy must be portable. As a CETC acquires a subscriber of an ILEC, the USF subsidy would transfer to the new provider. Likewise, the ILEC will loose USF contribution for the individual subscriber.

- USF subsidy allocation must be based on a subscriber's principal address, allowing USF distribution for one subscriber per address. Designating one subscriber per address will eliminate multiple dispersals to second or third providers that serve the same address or household.

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[14] Definition taken from the FCC Universal Service Home Page

- UDPU fully supports the FCC's proposal to require both rural incumbent ETCs and CETCs to file cost-based data and five year plans.

- Amend FCC ETC rules to mandate that the state commissions review incumbent ETC and CETC's cost-based data and five year plans prior to filing with USAC on an "annual" basis. Monthly and quarterly filings are burdensome for the telecommunication providers and the state commissions.

- To create a competitively neutral playing field, cost-based studies should never be based on the ILEC's network. When a CTEC applies for USF subsidy, it is imperative that it reveal its own costs on a cost per line basis. This will allow consideration for differing network technologies. However, the rural LEC's cost-based study could be utilized as a "reasonability" test.

- The UDPU promotes the idea of, creating a "generic" rural CETC wireline and wireless TELRIC cost-based models. Cost-based models are advantageous in that the cost model can identify estimated costs for all network components, yet will allow the user to change input values if there are significant cost differences for any of the components or assumptions. Without cost-based studies all network costs will continue to be estimates.

- The UDPU strongly supports the idea that each rural ETC and CETC file five year cost studies with state commissions for approval prior to filing with USAC. The state commissions are attuned to geographic and competitive issues in the high-cost areas assuring an accurate accounting of the issues.